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No. 82-118

In the Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC., PETITIONER

v.

THEODORE PARKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the filing of a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, suspends the running of the statute of limitations against the claims of the members of the asserted class until class certification is denied, so that they may file separate actions.

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INTEREST OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission has primary responsibility for enforcing Title VII of the Civil Rights Act of 1964. Private enforcement of Title VII, in the form of both individual suits and class actions (see *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 405 (1977)), is an important adjunct to the Commission's efforts. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The resolution of the question presented by this case will significantly affect the availability of individual actions and the efficacy of class actions under Title VII.

STATEMENT

1. Respondent was an employee of petitioner until July 15, 1977, when he was discharged. On October 3, 1977, respondent filed a charge with the Equal Employ-

ment Opportunity Commission, alleging that petitioner had harassed him and then discharged him because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Commission conducted an investigation and, finding no reasonable cause to believe that respondent's charge was true, notified him of his right to sue. Pet. App. 3a, 10a-11a.

The Commission issued this notification on November 9, 1978. Pet. App. 3a. Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1), provides that "within ninety days after the giving of such notice a civil action may be brought against the [party] named in the charge * * * by the person claiming to be aggrieved."

While the Commission was investigating respondent's charge, however, and before it issued the right to sue letter to respondent, two other black former employees of petitioner—Randy Pendleton and Marvin Allen—filed a Title VII class action against petitioner in the United States District Court for the District of Maryland. *Pendleton* v. *Crown, Cork & Seal*, Civil Action No. K-78-1734. See Pet. Br. App. 1a-6a. The complaint in *Pendleton* described the plaintiff class as the class of "black persons who have been, continue to be and who in the future will be denied equal employment opportunities by defendant on the grounds of race or color" (Pet. Br. App. 2a). After discovery, Pendleton sought to represent a class of black employees who, on or after January 12, 1973, could have filed a charge that they were discharged because of their race. Allen sought to represent a class of employees who, on or after March 31, 1973, could have filed a charge of racially discriminatory discharge, job assignment, retaliation, or harassment. Pet. Br. App. 7a. Respondent was a member of both classes. Pet. App. 3a.

The *Pendleton* class action was pending—and the district court had not decided whether to certify it as a class action—when the 90-day period that began with

respondent's receipt of the right to sue letter elapsed. On September 4, 1980, "[a]fter substantial discovery" (Pet. Br. App. 18a), the district court finally denied class certification in *Pendleton*. Pet. App. 3a. The court found that under petitioner's collective bargaining agreement, Pendleton was "a probationary employee rather than one with seniority rights" (Pet. Br. App. 9a; emphasis omitted). Because the class Pendleton sought to represent included employees with seniority rights, the court ruled that Pendleton's claim was not "typical of the claims * * * of the class" as required by Fed. R. Civ. P. 23(a)(3), and that Pendleton would not "fairly and adequately protect the interests of the class" as required by Fed. R. Civ. P. 23(a)(4). See Pet. Br. App. 9a-12a. The court ruled that Allen could not represent a class claiming racially discriminatory harassment because "[e]xcept for some nonspecific allegations * * * [he had] produced little suggesting the existence of a class so numerous that joinder is impracticable" (Pet. Br. App. 17a; see Fed. R. Civ. P. 23(a)(1)) and because Allen had "not demonstrated that [his] harassment claims are typical of claims held by the putative class" (Pet. Br. App. 17a).

2. Fifty-three days after class certification was denied in *Pendleton*, respondent brought this action, also in the United States District Court for the District of Maryland, claiming that he was harassed and discharged because of his race. Pet. App. 4a.[1] Respondent did not claim to represent a class. Petitioner moved for summary judgment, asserting that respondent's com-

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[1] The *Pendleton* action was dismissed, pursuant to a settlement agreement, in March 1981. Respondent exercised his right under *United Airlines* v. *McDonald*, 432 U.S. 385 (1977), to file a post-judgment motion to intervene in *Pendleton* for the purpose of appealing the denial of class certification. This motion was granted (Pet. Br. App. 18a-20a), but respondent did not file a timely notice of appeal. Pet. App. 4a n.1.

plaint was barred because it was filed more than 90 days after respondent received his right to sue notification.

The district court granted the motion. The court noted that under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), respondent could have intervened in the *Pendleton* action within 90 days after class certification was denied. The district court ruled, however, that "the benefit of the *American Pipe* tolling rule is limited to those class members who seek to intervene in the original class suit, and is inapplicable to independent suits on which the statute of limitations has otherwise run" (Pet. App. 15a).

The court of appeals reversed, stating that it would "exalt form over substance to say that intervention would be permitted but not institution of a new suit" (Pet. App. 6a). The court appeals explained (*ibid.*, quoting *Haas* v. *Pittsburgh National Bank*, 526 F.2d 1083, 1097 n.19 (3d Cir. 1975); brackets in original):

> The rationale of any statute of limitations is to put a defendant on notice of a claim with reasonable promptness so that defense evidence is not lost, memories have not faded and witnesses have not disappeared. * * * Where plaintiff's individual complaint is within the scope of the putative class action, those purposes are fully served since the defendant has "sufficient information within the statutory period to timely apprise [it] * * * of the nature and scope of the prospective litigation."

The court of appeals also reasoned that the district court's approach "would encourge the filing of individual suits * * * by members of the putative class while the issue of class certification was unresolved, adding additional burden and expense to the defendant" (Pet. App. 6a-7a; footnote omitted) because "[a] putative class member preferring an individual suit to joining the representatives of the class if it fails would be forced to file a protective action before the statute of

limitations had run on his individual claim" (*id.* at 6a n.3). Finally, the court of appeals pointed out that intervention can, and sometimes must, be denied, so that "the rule of *American Pipe*, if limited to intervenors, might achieve the inequitable result of allowing some putative members of the class to obtain an adjudiction of their claims while excluding others" (*id.* at 7a).

SUMMARY OF ARGUMENT

A. 1. This case is controlled by *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). *American Pipe* involved members of an asserted class who sought to intervene after class certification was denied; the Court held that the filing of the class action suspended the running of the statute of limitations on the asserted class members' individual claims. The Court reasoned that any other rule would force members of the asserted class to file protective intervention motions, thus bringing about precisely the inefficient multiplicity of litigation that class actions are intended to avoid. The Court also noted that the filing of the class action gave the defendant ample notice of the claims of the members of the asserted class; allowing those claims to be raised later was, therefore, not inconsistent with the policies underlying the statute of limitations.

Respondent is in the same position as the asserted class members who sought to intervene in *American Pipe*, except that respondent wishes not to intervene but to file a separate action. This distinction is plainly immaterial. Protective *complaints* filed by asserted class members who wish to pursue separate claims would be, if anything, more inefficient, more burdensome to defendants, and therefore more inconsistent with the purposes of the class action, than the protective intervention motions that *American Pipe* sought to render unnecessary. And a party in respondent's po-

sition might have many reasons for filing a separate action instead of intervening. He might decide that if he is to incur the expense and burden of litigating an individual claim, he wants to control the entire litigation; he might want the case litigated in another district, for example, or he might not want his claim considered in conjunction with those of the remaining parties to the failed class action.

At the same time, delay pending the resolution of a class certification issue does not impair a defendant's ability to defend a claim brought in a separate action any more than it would affect the ability to defend the same claim raised by intervention. *American Pipe* held that this delay (while a class claim encompassing the individual claim is pending) is not inconsistent with the purposes of the statute of limitations.

2. In *Eisen*, the Court ruled that even if a class is certified, the filing of the class action suspends the limitations period until class members have had an opportunity to opt out and pursue their individual claims. It follows *a fortiori* that the limitations period should be suspended in favor of members of an asserted class that was not certified: they may have refrained from filing individual actions because they relied on the class action to protect their interests, and refusing to suspend the statute of limitations in their favor may therefore be unfair to them. No such concerns with fairness were involved in the ruling in *Eisen*, because a party who opts out of a certified class shows, by doing so, that he was not relying on the class action.

B. No policies counsel against suspending the statute of limitations in favor of a party in respondent's position. Indeed, petitioner does not identify any way in which it was prejudiced because respondent brought a separate action instead of intervening in *Pendleton*, and most of the policy arguments petitioner advances were rejected by the Court in *American Pipe*.

1. a. We know of no reason to believe that *American Pipe* gave rise to abuses, and the court of appeals' decision does not increase the risk of abuses. A district court has the authority to decide whether a particular claim, apparently filed out of time, was properly comprised in a timely class action. If a class claim were expanded artificially or in bad faith, a district court could properly determine that, to that extent, the class action did not suspend the statute of limitations for members of the asserted class.

b. A separate action, unlike a motion to intervene, can be brought in a different district from that of the failed class action; but while a defendant might prefer to have all related claims against it pending in one district, this is not an interest protected by the statute of limitations. Other procedures—such as those governing consolidation and multidistrict litigation—are available to deal with this concern where appropriate, and principles governing the running of statutes of limitations should not be distorted for this purpose.

c. Any concerns arising from the possibility that a class action might suspend the statute of limitations for a separate, subsequent *class* action need not be addressed here, since respondent sued only on his own behalf. In any event, the policies of *American Pipe* apply equally to separate class actions, and there are additional reasons for permitting a class action to suspend the statute of limitations for other class actions raising the same claims on behalf of the same claimants.

2. In several respects, the court of appeals' interpretation of *American Pipe* is particularly appropriate in Title VII cases. The administrative procedures that precede Title VII litigation ensure that a potential defendant will have very prompt notice—soon after the transactions in issue, and long before any suit is filed—that particular actions or policies are being challenged as discriminatory. Moreover, because the limita-

tions period for filing a Title VII suit is so short, a claimant must file suit promptly after class certification is denied; thus litigation of a class of claims will not be excessively protracted.

ARGUMENT

THE FILING OF A TITLE VII CLASS ACTION SUSPENDS THE RUNNING OF THE STATUTE OF LIMITATIONS AGAINST THE CLAIMS OF MEMBERS OF THE ASSERTED CLASS UNTIL CERTIFICATION IS DENIED, SO THAT THEY MAY FILE SEPARATE ACTIONS

A. This Court's Decisions Compel the Conclusion that the Statute of Limitations is Tolled for Members of the Asserted Class who Bring Separate Actions, as Well as for Those who Intervene After Class Certification is Denied

1. a. In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the State of Utah brought a class action under Section 1 of the Sherman Act, 15 U.S.C. 1, on behalf of various state and local government units. The action was brought 11 days before the statute of limitations expired. Almost 19 months later, the district court ruled that the suit could not proceed as a class action because the asserted class was insufficiently numerous under Fed. R. Civ. P. 23(a)(1). Eight days later, certain members of the class named in Utah's complaint sought to intervene; this Court held that the statute of limitations did not bar them from doing so.

The Court stated: "We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. The principal reason for this rule, the Court said, is that otherwise members of the asserted class could protect their rights only by filing individual claims. This approach, the Court reasoned,

would defeat the purpose of the class action: "[a] federal class action is no[t] * * * 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550. Refusing to suspend the statute of limitations in favor of the members of the asserted class "would deprive * * * class actions of the efficiency and economy of litigation which is a principal purpose of the procedure. Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.* at 553.

The Court also noted that suspending a statute of limitations between the filing of a class action and the denial of class certification "is in no way inconsistent with the functional operation of a statute of limitations." 414 U.S. at 554. By filing his complaint, the asserted class representative can "notif[y] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs * * *. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation * * *." *Id.* at 555.

Because allowing intervention could not prejudice the interests that the statute of limitations was intended to protect, the Court explicitly stated that "no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit." 414 U.S. at 551. The Court also emphasized that members of the class asserted in the complaint were not to be faulted for wait-

ing until class certification was denied before they acted to protect their rights. The Court explained (414 U.S. at 552, quoting Fed. R. Civ. P. 23(c)(1)):

> During the pendency of the District Court's determination * * * [of whether the suit shall proceed as a class action], which is to be made "as soon as practicable after the commencement of an action," potential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established * * * does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it * * *.

b. The court of appeals' holding in this case follows directly from *American Pipe*. There is no dispute that respondent was an "asserted member[] of the [*Pendleton*] class who would have been [a] part[y] had th[at] suit been permitted to continue as a class action" (*American Pipe, supra*, 414 U.S. at 554). Since *Pendleton* was pending as a class action when respondent received his right to sue letter, the statute of limitations would not have begun to run against him, under the *American Pipe* approach, until class certification was denied; and there is no dispute that respondent sued within 90 days of that date. Apart from its cursory argument (Pet. Br. 24-26) that the 90-day limitation period is jurisdictional—an argument we answer at pages 21-23, *infra*—petitioner concedes that *American Pipe* would have allowed respondent to intervene at the time he brought his separate suit. The only question, therefore, is whether the rationale of *American Pipe* applies to members of the asserted class who choose to file separate actions as well as to those who intervene.

The rationale of *American Pipe* applies with at least equal force to a member of the asserted class who wishes to file his own suit instead of intervening. If the statute of limitations is not suspended in his favor, he will be forced to file a "protective" complaint; the result

would be to "deprive * * * class actions of the efficiency and economy of litigation which is a principal purpose of the procedure" (*American Pipe*, *supra*, 414 U.S. at 553) by "encour[aging the] filing of repetitious papers and motions" (*ibid.*). See *General Telephone Co.* v. *Falcon*, No. 81-574 (June 14, 1982), slip op. 7-8, quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion"). Indeed, the filing of a duplicative complaint while a potential class action is pending is significantly more inefficient than the filing of a motion to intervene. The filing of a separate complaint is likely to be more burdensome to the defendant; and a complaint may be filed in another district, thus forcing different courts to coordinate their proceedings.[2]

A member of an asserted class may have many reasons for filing a protective complaint instead of relying on his ability to intervene after the motion for class certification is denied. He may believe that if he is to incur the expense and burdens of litigating an individual

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[2] For this reason, petitioner is incorrect in asserting that the court of appeals' approach does not "effectuate the broad purposes of Rule 23" (Pet. Br. 16) by discouraging unnecessary litigation. Moreover, it is petitioner's approach, not the court of appeals', that would have the effect of "encouraging defections [from an asserted class] through the commencement of private suits" (Pet. Br. 13). It is also unclear what petitioner means by saying that *American Pipe* does not apply "where the purpose [is] to advance a private claim" (Pet. Br. 16); the purpose of the *American Pipe* rule is to ensure that parties legitimately concerned to protect their interests do not have an incentive to diminish the efficiency of the class action procedure, and the court of appeals' approach furthers this purpose. In any event, intervention advances a private claim in the same sense that filing a separate action does.

claim, he should have full control of the litigation; he may not want his claim considered in juxtaposition with the claims of the parties who filed the asserted class action, for example, or he may want to litigate in a different district from that in which the class action was brought. There is no reason to require a claimant who has such a view to file a protective complaint; under *American Pipe*, "potential class members are mere passive beneficiaries of the action brought in their behalf" with no "duty to take note of the suit or to exercise any responsibility with respect to it" until the class is certified (414 U.S. at 552).[3] It is "the denial of class status [that] is [the] 'critical point which puts putative class members on notice that they must act to protect their rights.'" *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 399 (1977) (Powell, J., dissenting), quoting *Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915, 922 (7th Cir. 1976) (dissenting opinion).[4]

Moreover, suspending a statute of limitations in favor of a party who brings a separate action is no more inconsistent with the purposes of a limitations period than suspending it in favor of an intervenor. A statute of limitations is "'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it

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[3] Similarly, contrary to petitioner's suggestions (Pet. Br. 5, 22-23), it was both proper and reasonable for respondent to file a separate individual action while at the same time intervening in *Pendleton* for the purpose of challenging the denial of class certification. There was no assurance that a class action could ever be certified, and respondent presumably wished to have his own claim litigated should no class action be possible.

[4] The fact that there may sometimes be reason for suspending the statute of limitations until a later time, as in *McDonald* itself, does not make this observation less trenchant for present purposes.

is unjust not to put the adversary on notice to defend within the period of limitation * * *.'" *American Pipe, supra*, 414 U.S. at 554, quoting *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). For all of these purposes, it makes no difference whether a member of the asserted class litigates his claim by intervening or by filing a separate suit. Petitioner "was put on notice by the filing of the [*Pendleton*] complaint of the possibility of classwide liability" (*United Airlines, Inc.* v. *McDonald, supra*, 432 U.S. at 395). The *Pendleton* complaint "notifie[d petitioner] not only of the substantive claims being brought against [it], but also of the number and generic identities of the potential plaintiffs" (*American Pipe, supra*, 414 U.S. at 555). Respondent's claim "'concern[ed] the same evidence, memories, and witnesses as the subject matter of the original class suit.'" *United Airlines, Inc.* v. *McDonald, supra*, 432 U.S. at 394 n.14, quoting *American Pipe, supra*, 414 U.S. at 562 (Blackmun, J., concurring).

Thus, "[w]ithin the period set by the statute of limitations, [petitioner had] the essential information necessary to determine both the subject matter" of respondent's claim and the fact that respondent was a potential plaintiff (*American Pipe, supra*, 414 U.S. at 555). Petitioner knew that it should preserve evidence bearing on precisely the claims that respondent asserts, and petitioner had no basis whatever for "repose" (*United States* v. *Kubrick*, 444 U.S. 111, 117 (1979)); it knew that its employment practices for the period that included respondent's employment and discharge were under challenge in court on grounds of racial discrimination.

2. Any doubt that the tolling rule of *American Pipe* extends to parties in respondent's position was removed by the Court's interpretation of *American Pipe* in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

In *Eisen* the Court held that in a certified Rule 23(b)(3) class action, "[i]ndividual notice must be sent to all class members whose names and addresses [can] be ascertained through reasonable effort" (417 U.S. at 173) so that, among other things, they may opt out of the class if they wish. In rejecting the suggestion that this rule should not apply if class members' individual claims would be barred by the statute of limitations, because they would then have no reason to opt out, the Court stated (*id.* at 176 n.13):

> This contention was disposed of by our recent decision in *American Pipe & Construction Co.* v. *Utah* * * * which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

Thus, under *Eisen*, the filing of a class action suspends the statute of limitations in favor of a member of a class that has been certified; it follows *a fortiori* that the statute must be suspended for a member of an asserted class that has not been certified. A class member who opts out will seldom be able to claim that he refrained from filing a separate action because he relied on the class action to represent his interests; by opting out of the certified class, he shows that he considers the class action an inadequate means of protecting his claim. By contrast, a party like respondent may well have been relying on the pending asserted class action. As we noted, *American Pipe* specifically did not require a plaintiff to show such reliance.[5] But where, as

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[5] The reasons that a claimant need not show reliance are implicit in the premises of *American Pipe*. First, because the filing of the asserted class action gives the defendant notice of all the claims it comprises, it is immaterial, for purposes of the statute of limitations, that some plaintiffs who have slept on their rights receive an "undeserved" opportunity to press their claims; the defendant can show no prejudice of the sort that a statute of limitations is intended to prevent. Second, if reliance

in the case of members of an asserted class that was not certified, it is possible that a claimant relied on the pendency of the class action, the danger of unfairness is a strong additional argument for suspending the statute of limitations.[6]

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were required, prudent claimants who *are* relying on the pendency of the asserted class action would be likely to file protective complaints or motions—thus defeating the purpose of the *American Pipe* rule—instead of incurring the risk that they will not be able to show reliance if the class is not certified. See *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1449-1450 (1976).

[6] Most of the courts that have addressed the issue appear to have agreed with the court of appeals that the filing of a class action tolls the statute of limitations for all members of the asserted class, irrespective of whether they intervene or file separate actions. See, *e.g.*, *Susman* v. *Lincoln American Corp.*, 587 F.2d 866, 869 (7th Cir. 1978), cert. denied, 445 U.S. 942 (1980); *In re Fine Paper Litigation*, 632 F.2d 1081, 1087 (3d Cir. 1980); *Satterwhite* v. *City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1978), vacated on other grounds, 445 U.S. 940 (1980); *Sanders* v. *John Nuveen & Co.*, 524 F.2d 1064, 1074 n.28 (7th Cir. 1975), vacated on other grounds, 425 U.S. 929 (1976). See also *Green* v. *United States Steel Corp.*, 481 F. Supp. 295, 299 (E.D. Pa. 1979); *Nelson* v. *United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (E.D. La. 1978); *Lilly* v. *Harris-Teeter Supermarket*, 545 F. Supp. 686, 705 (W.D.N.C. 1982); *Bantolina* v. *Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121 n.19 (D. Hawaii 1976); *McAlpine* v. *AAMCO Automatic Transmissions*, 24 Fed. R. Serv. 2d (Callaghan) 275, 276 (E.D. Mich. 1977); *Gramby* v. *Westinghouse Electric Corp.*, 84 F.R.D. 655, 662 (E.D. Pa. 1979). Petitioner (Pet. Br. 9 n.1) and amicus curiae Equal Employment Advisory Council (EEAC Am. Br. 13) are incorrect in suggesting that *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981), supports petitioner's view; in that case, class certification was granted, not denied, and the claimants who invoked *American Pipe* sought to intervene before the motion to certify a class was decided. See 650 F.2d at 346 n.7. Cf. pages 13-15, *supra*.

B. No Policies Counsel Against Suspending the Statute of Limitations for Members of the Asserted Class who File Separate Actions

1. At no point in its brief does petitioner identify any way in which it was prejudiced because respondent brought a separate action instead of intervening in *Pendleton*.[7] Moreover, most of the general policy arguments advanced by petitioner and amicus curiae Equal

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The Second and Ninth Circuits appear to have taken the position advanced by petitioner. *Pavlak* v. *Church*, 681 F.2d 617 (9th Cir. 1982), petition for cert. pending, No. 82-650; *Stull* v. *Bayard*, 561 F.2d 429 (2d Cir. 1977); *Arneil* v. *Ramsey*, 550 F.2d 774 (2d Cir. 1977). The opinions of the Second Circuit contain almost no explanation of the reasons for the result they reached. *Stull* simply followed *Arneil*. See 561 F.2d at 433. In addition, the suit held barred in *Stull* was a class action filed by a party who had acted as the attorney in the earlier class action, brought by his spouse. *Ibid.* Such a suit presents a variety of considerations not present here. See, *e.g.*, pages 19-20, *infra*.

The discussion of this issue in *Arneil* apparently was dictum, because the court appears to have ruled that an amended complaint asserting a class that included the plaintiffs who invoked *American Pipe* was not filed until after the limitations period had expired for those plaintiffs. See 550 F.2d at 782. The *Arneil* panel also seemed to assume, contrary to the Court's express statement in *American Pipe*, that the rule of that case would not apply if the asserted class members did not rely on the filing of the class action. See 550 F.2d at 783. See also page 21, *infra*.

The divided Ninth Circuit panel in *Pavlak* explained its conclusion by asserting that "[i]f a class member chooses to file an independent action, he or she may do so regardless of the pendency of the suit in which there is a motion to certify" (681 F.2d at 620); the panel majority did not explain why this was not equally true of intervenors, and why such an approach does not present the dangers of unnecessary litigation that the *American Pipe* rule is intended to avoid.

[7] Indeed, it appears that respondent sought to have his individual claim consolidated with the *Pendleton* suit—a course that would have been, from petitioner's point of view, indistinguishable from intervention—but petitioner opposed the motion to consolidate. See J.A. 1A.

Employment Advisory Council would apply equally to intervenors and were considered and rejected by the Court in *American Pipe*.[8] Nor does any other policy counsel against the adoption of the court of appeals' approach.

a. As Justice Blackmum noted in his concurring opinion in *American Pipe*, that decision does not constitute "encouragement to lawyers * * * to frame their pleading as a class action, intentionally, to attract and save members of the purported class who have slept on their rights. Nor does it necessarily guarantee intervention for all members of the purported class." 414 U.S. at 561. Applying the *American Pipe* approach to members of the asserted class who file separate actions similarly does not create a danger of improper manipulation of limitations periods by counsel, because, as in the case of asserted class members who intervene (see *id.* at 561-562), district courts may invoke a variety of measures to guard against this danger. Cf. *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 333 (1980) ("The Title VII remedy is an equitable one; a court of equity should adjust the relief accordingly."). For example, a

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[8] This is true, for example, of petitioner's assertions that the court of appeals' rule "extend[s] statutes of repose for periods of time far beyond what legislatures have prescribed" (Pet. Br. 5) and that "[s]uch extensions will be substantial and will be automatically available to all individuals who are within the scope of a civil complaint brought as a class action" (Pet. Br. 5; see Pet. Br. 23).

Petitioner (*e.g.*, Pet. Br. 13-14) and amicus (EEAC Am. Br. 21) are obviously incorrect in suggesting that the court of appeals' approach will somehow revive the dangers of "one-way intervention" that Rule 23 was intended to remove (see *American Pipe*, *supra*, 414 U.S. at 547). If a class is certified, its members are bound by the judgment unless they opt out. If no class is certified, a party is bound by (and only by) the judgment entered on his claim—whether that claim is raised by a motion to intervene or a separate complaint.

district court has authority to determine whether a claim that would otherwise be barred is comprised within the claim raised on behalf of the asserted class in the earlier class action.[9] If the class claim were expanded artificially or in bad faith, the court should rule that, to that extent, it does not suspend the running of the statute of limitations, at least for members of the asserted class who did not rely in good faith on the pendency of the action. Moreover, if a class claim is plainly frivolous, the district court is likely to deny certification (or dismiss the claim) soon after it is filed; as a result, suspending the running of the statute of limitations while the suit is pending as a class action will have only a minimal effect.

In this case, of course, there is no suggestion that the *Pendleton* class action was brought in bad faith. On the contrary, the class certification question in *Pendleton* apparently proved to be highly complex and subtle; the Court noted in *American Pipe* that this will often be true. See 414 U.S. at 553. See also *General Telephone Co.* v. *Falcon*, *supra*, slip op. 12.

b. Amicus curiae Equal Employment Advisory Council suggests that the court of appeals' ruling will create unwarranted burdens because a separate complaint, unlike a motion to intervene, can be filed in a different district from that in which the asserted class action was brought. See EEAC Am. Br. 20; see also Pet. Br. 18. Respondent's action was brought before the same court (and judge) as *Pendleton*, so any arguments based on this consideration do not apply to this case.

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[9] This inquiry is not unfamiliar; it resembles the determination whether an amendment to a complaint relates back to the date of filing for limitations purposes. See Fed. R. Civ. P. 15(c); *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1451-1454 (1976).

More generally, however, while a defendant might prefer to have all the litigation against it brought in the same court, or in the same action, this is not an interest that the statute of limitations protects, and tolling doctrines should not be designed to bring about such a result. The *delay* in filing a claim is equally burdensome to a defendant whether the claim is raised by intervention or by a separate action in another district, and only the burdens resulting from delay are properly considered in construing a statute of limitations. Any legitimate interest a defendant has in combining the claims against it in a single proceeding is protected by the procedures governing multidistrict litigation (see 28 U.S.C. 1407) and consolidation of cases (see Fed. R. Civ. P. 42(a)), not by the statute of limitations.

c. Finally, petitioner (Pet. Br. 24) and amicus (EEAC Am. Br. 22) urge that tolling the statute of limitations in favor of a separate *class* action will lead to untoward results. Respondent, of course, did not attempt to bring a class action; thus to the extent that separate class actions create special concerns, the application of the court of appeals' rule to them need not be considered here.

In any event, we see no reason not to suspend the running of the statute of limitations for a subsequent class action while the question whether the initial class will be certified is unresolved. Refusing to suspend the statute of limitations will encourage the filing of a multiplicity of protective class actions raising the same claims—a burdensome and undesirable result. Moreover, to the extent that class members' individual claims are too small to be litigated except in a class action, refusing to suspend the statute of limitations may leave them without a remedy if the first party to file a class action is determined to be an inadequate representative or not a typical claimant. See *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318,

1450 n.291 (1976). There is no reason to doubt that any dangers of improper manipulation of the limitations period can be averted in the ways we have described, or if necessary by disciplining attorneys who attempt to engage in unethical practices. Notably, we know of no evidence that *American Pipe* has given rise to widespread abuses.[10]

2. In several respects, the court of appeals' approach is particularly appropriate in Title VII cases. First, because of the administrative remedies available under Title VII, a defendant will ordinarily have notice of a claim well before any suit is filed. Respondent, for example, filed an administrative charge, which was served on petitioner, within 180 days of the alleged discriminatory acts. See 42 U.S.C. 2000e-5(e). Thus, by the time respondent filed his individual action, petitioner had already received notice—shortly after the transactions in question—that its actions toward respondent were being challenged, and had had an opportunity to preserve evidence. Surely if this notification of a specific claimant's grievance is followed by the timely filing of a class action that includes that grievance, a defendant will be fully aware of the need to prepare for litigation of the individual's claim. Before any Title VII action is brought, potential defendants will receive comparable notice through the administrative process. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 771 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975); *Wheeler* v. *American Home Products*

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[10] Amicus also suggests (EEAC Am. Br. 21) that a claimant might bring a separate action to escape the effect of adverse rulings rendered in the asserted class action. It is unclear how a ruling could bind a class member who is not a named party before the class is certified and the member has had an opportunity to opt out; but if a party were bound by such a ruling, he would presumably be bound, by virtue of collateral estoppel, in a separate action as well.

Corp., 563 F.2d 1233, 1239 (5th Cir. 1977); *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968).

Second, the 90-day period within which a Title VII suit must be filed is quite short. Under the *American Pipe* rule and the court of appeals' approach, the filing of a class action merely suspends the statute of limitations, which begins to run again when certification is denied; consequently, an asserted class member's separate Title VII suit must be filed no more than 90 days after class certification is denied. For this reason, there is no danger that the limitations period will extend so far beyond the conclusion of the class action that the defendant may be lulled into believing that it no longer need protect against litigation of the individual's claim. Cf. *Arneil* v. *Ramsey*, 550 F.2d 774, 783 (2d Cir. 1977).

3. Petitioner urges, however, that the 90-day limitations period of Title VII is a "jurisdictional prerequisite" (Pet. Br. 24), and therefore cannot be suspended by the filing of a class action. This argument cannot be reconciled with the Court's disposition of *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 811 & n.9 (1980). The Court specifically noted that the Title VII action in *Mohasco* was filed 91 days after the Commission issued a right to sue letter to the plaintiff, but the Court did not order the action dismissed for want of jurisdiction; instead, it simply remarked that the defendant "did not assert [the plaintiff's] failure to file the action within 90 days as a defense." This treats the 90-day period as an ordinary statute of limitations and is inconsistent with petitioner's contention that it is a jurisdictional limit.

Moreover, in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the court held that the 180-day period within which a party must file a charge with the Commission (see 42 U.S.C. 2000e-5(e)) is not jurisdictional. 455 U.S. at 392-398. The Court cited the treatment of the untimely filing in *Mohasco* as support for

its conclusion, describing the 90-day period as "a related Title VII time provision" and suggesting that similar principles should govern both limitations provisions. See 455 U.S. at 398. Petitioner suggests no reason for treating the two limitations periods differently. And as petitioner acknowledges (Pet. Br. 25 n.10), every court of appeals that has considered the issue since *Zipes* has agreed that the 90-day period is not jurisdictional. See *Jackson* v. *Seaboard Coast Line R.R.*, 678 F.2d 992, 1000-1010 (11th Cir. 1982); *Whatley* v. *Department of Education*, 673 F.2d 873, 879 n.5 (5th Cir. 1982); *Rice* v. *New England College*, 676 F.2d 9, 10 (1st Cir. 1982); *Gordon* v. *National Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982).[11]

The 90-day period is a limitation on the time within which a suit may be filed, and statutes defining such limitations are traditionally subject to equitable tolling; the Court so noted in *American Pipe* itself, where it rejected an argument similar to petitioner's. See 414 U.S. at 556-559. See also *Burnett* v. *New York Central R.R.*, 380 U.S. 424 (1965); *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 234-235 (1959). Petitioner cites no example of a limitation on the period within which a complaint may be filed that has been treated as jurisdictional.[12] Moreover, the 90-day period

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[11] Petitioner asserts (Pet. Br. 24-25) that the Court has referred to the 90-day period as a jurisdictional limitation. See *United Airlines, Inc.* v. *Evans*, 431 U.S. 553, 555 n.4 (1977); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973). But these are precisely the statements that the Court discounted in *Zipes*, noting that "the legal character of the requirement was not at issue in those cases" (455 U.S. at 393 n.6, 395).

[12] Contrary to petitioner (Pet. Br. 26), the filing of a Title VII complaint is in no sense comparable to an appeal, as the Court has made clear. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973). The Commission does not adjudicate

specified by Title VII is not expressly made a condition of a district court's jurisdiction; the limitations provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts" (*Zipes*, *supra*, 455 U.S. at 394), and the jurisdictional provisions "contain[] no reference to" the limitations period (*id.* at 393-394). Compare 42 U.S.C. 2000e-5(f)(1) with 42 U.S.C. 2000e-5(f)(3).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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the rights of parties, and the district court does not review its determinations. Accordingly, the 90-day period is not analogous to the period allowed for the filing of a notice of appeal after a judgment has been entered that finally determines the parties' rights. See *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 264 (1978), quoting *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412, 415 (1943). And, in contrast to the provisions at issue here, the statute and rule specifying the time for filing a notice of appeal are by their terms mandatory. See 28 U.S.C. 2107; Fed. R. App. P. 4(b).